UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NEXT MILLENNIUM REALTY, L.L.C., and 101 FROST STREET ASSOCIATES,

Plaintiffs,

- against -

ADCHEM CORP., LINCOLN PROCESSING CORP., NORTHERN STATE REALTY CORP., NORTHERN STATE REALTY CO., and PUFAHL REALTY CORP.,

Defendants;

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ADCHEM CORP., LINCOLN PROCESSING CORP., NORTHERN STATE REALTY CORP., NORTHERN STATE REALTY CO., and PUFAHL REALTY CORP.,

Third-Party Plaintiffs,

- against -

THE ESTATE OF JERRY SPIEGEL, and ALAN EIDLER, PAMELA SPIEGEL SANDERS, and LISE SPIEGEL WILKS, AS EXECUTORS OF THE ESTATE OF JERRY SPIEGEL,

Third-Party Defendants.

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Case No. CV-03-5985 (ARL)

RULE 56.1 COUNTER-STATEMENT OF DEFENDANTS/THIRD-PARTY PLAINTIFFS ADCHEM CORP., LINCOLN PROCESSING CORP., PUFAHL REALTY CORP., NORTHERN STATE REALTY CORP., and NORTHERN STATE REALTY CO.

Pursuant to Rule 56.1 of the Local Rules of the Eastern District of New York, defendants Adchem Corp., Lincoln Processing Corp., Pufahl Realty Corp., Northern State Realty Corp., and Northern State Realty Co. (together, "Defendants"), submit this Counter-Statement under Local Rule 56.1 in response to the November 11, 2013 Rule 56.1 Statement of Undisputed Facts in Support of Motion for Summary Judgment of Plaintiffs/Third-Party Defendants (together, "Plaintiffs")[1]:

[1] Defendants object to Plaintiffs' statement that there are issues of material fact concerning the liability of Defendants Adchem Corp. and Lincoln Processing Corp. under theories of single enterprise liability and joint enterprise liability. Defendants further state that Plaintiffs are incorrect that Adchem Corp. and Lincoln Processing

1. The 89 Frost Street Property (hereinafter the "Property") is a Facility under the provisions of the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. Section 9601 et seq. ("CERCLA"). (New York State Department of Environmental Conservation, Record of Decision, 89 Frost Street Site, Town of North Hempstead, Nassau County, Site Number # 1-30-043-L, Operable Unit 01-Soil (Mar. 2000); New York State Department of Environmental Conservation, Record of Decision, Former Autoline Automotive Site # 1-30-043-I, 89 Frost Street Sites # 1-30-43-L, Former Applied Fluidics Site # 1-30-43-M, Frost Street Sites, Town of North Hempstead, Nassau County, Operable Unit 02 – Combined Groundwater (Mar. 2000); New York State Department of Environmental Conservation, Record of Decision, New Cassel Industrial Area Sites, Town of North Hempstead, Nassau County, New York, Off-Site Groundwater South of the New Cassel Industrial Area, Operable Unit No. 3, Site Numbers 1-30-043-A, 1-30-043-B, 1-30-043-C, 1-30-043-D, 1-30-043-E, 1-30-043-H, 1-30-043-I, 1-30-043-K, 1-30-043-L, 1-30-043-M, 1-30-043-P, 1-30-043-S, 1-30-043-U & 1-30-043-V (Oct. 2003) (hereinafter, collectively, RODs).

RESPONSE: Not disputed.

2. The RODs identify perchloroethylene (hereinafter "PCE") as a major contaminant of concern at the Property. (Record of Decision, Operable Unit 01 - Soil at 1; Record of Decision, Operable Unit 02 – Combined Groundwater at 1; Record of Decision, Operable Unit No. 3 at 7).

RESPONSE: Not disputed.

Corp. signed lease termination documents for the property as Tenant. (See Agreement by and among Jerry Spiegel, Pufahl Realty Corp. a dissolved corporation, Joseph Pufahl Charles Pufahl and Herman Pufahl, partners, doing business as Northern State Realty Co., Northern State Realty Corp., a dissolved corporation, Lincoln Processing Corp., a corporation, and Adchem Corp., a corporation (May 18, 1977)).

3. PCE has been disposed of on the Property. (See paragraphs 70 – 73 below).

RESPONSE: Not disputed that PCE has been released at the Property. To the extent that Plaintiffs imply that PCE was intentionally disposed of on the Property, Defendants state that there is no evidence to support that allegation. (See John Pufahl Dep. at 92:14-93:4; see also Deposition of Dieter Kannapin, Oct. 8, 2013, at 50:21-52:22.).

4. Plaintiffs have entered into three Consent Orders with the New York State Department of Environmental Conservation requiring Plaintiffs to remediate the Property (hereinafter, the "Consent Orders"). (In the Matter of the Development and Implementation of a Remedial Program for Operable Unit 1 of an Inactive Hazardous Waste Disposal Site, Under Article 27, Title 13, and Article 71, Title 27 of the Environmental Conservation Law of the State of New York by 101 Frost Street Associates, Order On Consent, No. W1-0799-00-05, Site Code # 1-30-043I (Jan. 23, 2003); In the Matter of the Development and Implementation of a Remedial Program for Operable Unit 1 of an Inactive Hazardous Waste Disposal Site, Under Article 27, Title 13, and Article 71, Title 27 of the Environmental Conservation Law of the State of New York by 101 Frost Street Associates, Order On Consent, No. W1-0799-00-05, Site Code # 1-30-043L (Jan. 23, 2003); In the Matter of the Development and Implementation of a Remedial Program for Operable Unit 1 of an Inactive Hazardous Waste Disposal Site, Under Article 27, Title 13, and Article 71, Title 27 of the Environmental Conservation Law of the State of New York by 101 Frost Street Associates, Order On Consent, No. W1-0893-01-07, Site Code # 1-30-

043M (Jan. 23, 2003); Fred Werfel Dep. at 320:3-7, 401:3-8, 419:17-21, Dec. 12, 2012; Arthur Sanders Dep. at 382:4-9. Nov. 29, 2012; Alan Eidler Dep. at 27:13-17, Apr. 5, 2013).

RESPONSE: Not disputed.

5. Plaintiffs have incurred costs remediating the Property pursuant to the Consent Order Obligations. (Werfel Dep. at 57:8—15; Sanders Dep. at 124:12—23; Eidler Dep. at 21:19—23:2).

RESPONSE: Not disputed.

6. Certain of the costs incurred by Plaintiffs are consistent with the National Contingency Plan (hereinafter, "NCP"). [fn: Plaintiffs' Motion for Partial Summary Judgment is limited to liability. Material issues of fact exist as to which of the expenses incurred are compliant with the NCP. There is a general agreement between the parties that some of the expenses are NCP-compliant.] (Phil Coop, Expert Opinion at 5—7 (Apr. 24, 2013); Phil Coop, Supplemental Expert Opinion at 1—3, (Aug. 9, 2013); Phil Coop Dep. at 15:14—24, 28:19—30:8, Aug. 13, 2013; Gary J. DePippo, Expert Opinion at 1-1 (July 22, 2013); Gary DePippo Dep. at 28:16—30:10, Sept. 5, 2013).

RESPONSE: Not disputed that Plaintiffs' Motion for Partial Summary Judgment is limited to liability and that material issues of fact exist as to which, if any, of Plaintiffs' incurred costs are compliant with the NCP. Disputed that there is an agreement between the parties that some costs incurred by Plaintiffs are consistent with the NCP, but affirmatively state that some costs incurred by Plaintiffs are likely consistent with the NCP. (See Gary J. DiPippo, Expert Opinion at 1-1 (July

22, 2013)). Defendants affirmatively state that the April 24, 2013 Report, May 15, 2013 Supplemental Report, and August 9, 2013 Amended Report of Phillip Coop are not admissible evidence. Defendants affirmatively state that Plaintiffs have presented no evidence that their non-legal costs incurred prior to the consent orders with DEC are NCP-compliant. (Phil Coop Dep. at 124:22-125:17). Defendants affirmatively state that Plaintiffs have presented no admissible evidence that their legal costs incurred prior to the consent orders with DEC are NCP-compliant. (See Phil Coop Dep. at 126:10-129:20).

7. Between October 10, 1958 and July 10, 1995 Jerry Spiegel (hereinafter "Landlord") was the owner of record of the Property. (Title Report at SFSP Response 1 at pages 28-31).

RESPONSE: Not disputed, and affirmatively state that between 1966 and 1977 Jerry Spiegel repeatedly referred to himself as the owner in fee simple of the Property. (Certificate and Agreement between Jerry Spiegel, Pufahl Realty Corp., and the Prudential Insurance Company of America (May 24, 1966), at first page; see also Answer, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County) (Filed July 1976), at p.1-2).

8. On April 1, 1966, defendant Pufahl Realty Corp. entered into a lease with a purchase option with Landlord for the Property (hereinafter the "Lease"). (Lease Agreement between Jerry Spiegel and Pufahl Realty Corp. (Apr. 1, 1966)).

RESPONSE: Not disputed.

9. After entering into the Lease, Pufahl Realty Corp. changed its name to Northern State Realty Corp. (John Pufahl Dep. at 66:13-21, Apr. 8, 2013; Elliot Miller Dep. at 14:3-8, 15:1-4, Oct. 15, 2013).

RESPONSE: Not disputed. Affirmatively state that Pufahl Realty Corp. changed its name to Northern State Realty Corp. on March 25, 1969 and filed a notice of name change with the Secretary of State. (Filing Receipt, Amendment to Change the Name of Pufahl Realty Corp. to Northern State Realty Corp., State of New York, Dept. of State, Division of Corporations and State Records (Mar. 25, 1969)).

10. Sometime before 1973, Northern State Realty Corp. assigned the Lease to a newly formed general partnership called Northern State Realty Co. (Miller Dep. at 14:24—15:4, 41:1-6, 104:6—25; Charles Pufahl Dep. at 35:12—24, Jan. 16, 2013; John Pufahl Dep. at 64:12—17).

RESPONSE: Disputed. Northern State Realty Corp. assigned the Lease to Northern State Realty Co. in May of 1973. (Assignment Agreement between Northern State Realty Corp. and Northern State Realty Co. (May 21, 1973)).

11. Pursuant to the terms of the Lease, Landlord agreed to a build-to-suit arrangement with Tenant, whereby Landlord agreed to build a 55,000 square foot manufacturing facility for Tenant. (Lease at ¶ 33).

RESPONSE: Disputed. The building at 89 Frost was already constructed when the Lease was negotiated. (Jerry Spiegel Deposition, August 16, 1976, at 13:7-14:19; Charles Pufahl Dep. at 120:8-25; see 1966 Catalogue of Choice, Designed Industrials by Jerry Spiegel Associates, at 2d pg.).

12. Pufahl Defendants desired to own the Property and negotiated a purchase option into the Lease. (Lease at ¶ 65; Miller Dep. at 31:18-23, 70:15-24, 107:8-11; Letter from Joseph Pufahl, Partner, Northern State Realty Co., to Jerry Spiegel (June 4, 1976)).

RESPONSE: Disputed. The purchase option under the Lease was negotiated by Pufahl Realty Corp., not the Pufahl Defendants generally. To the extent that the Pufahl Brothers were involved in the negotiation of the Lease and the purchase option, it was in their capacity as officers and directors of Pufahl Realty Corp., and not any of the other Pufahl Defendants. (Lease at p.1; Miller Dep. at 31:6-15; 70:6-14).

13. At all relevant times, three brothers, Charles Pufahl, Joseph Pufahl and Herman Pufahl (hereinafter, the "Pufahl Brothers"), were the beneficial owners, managers and operators of each of the Pufahl Defendants. (John Pufahl Dep. at 7:7-11, 25:21-24, 67:9-23, 70:21-25, 103:19-104:2; Charles Pufahl Dep. 20:4-14, 33:11-21, 35:8-11, 35:25-36:14, 36:22-25; Miller Dep. at 14:3-15:4).

RESPONSE: Disputed.

With respect to Lincoln Processing Corp.: the Pufahl Brothers were the shareholders, officers and directors of Lincoln Processing Corp. from

approximately 1961 until the dissolution of Lincoln Processing Corp. in approximately 1977. (Charles Pufahl Dep. at 5:15-6:6; Minutes of a Joint Special Meeting of the Stockholders and Directors of Lincoln Processing (Nov. 23, 1977)).

With respect to Pufahl Realty Corp., later known as Northern State Realty Corp., the Pufahl Brothers were the shareholders, officers and directors of that corporation from its incorporation in February of 1965 until its dissolution in approximately 1973. (Minutes of First Meeting of Directors of Pufahl Realty Corp. (Feb. 15, 1965), at 6-11; Minutes of First Meeting of Shareholders of Pufahl Realty Corp. (Feb. 15, 1965), at 13-14; Filing Receipt, Amendment to Change the Name of Pufahl Realty Corp. to Northern State Realty Cop., State of New York, Dept. of State, Division of Corporations and State Records (Mar. 25, 1969); Minutes of a Joint Special Meeting of Stockholders and Directors of Northern State Realty Corp. (Oct. 31, 1973); Charles Pufahl Dep. at 33:11-21, 35:8-11).

With respect to Northern State Realty Co., the Pufahl Brothers were the partners of Northern State Realty Co. from its formation in 1973 until the death of Herman Pufahl in 1995. (Agreement made May 22nd, 1973 between Joseph Pufahl, Charles Pufahl, and Herman Pufahl (May 22, 1973); Restated and Amended Partnership Agreement, Northern State Realty Co., A03512-22 (Dec. 15, 1995)).

With respect to Adchem Corp.'s ownership, at the time of Adchem Corp.'s incorporation in February of 1965, the record owners of all of the shares of Adchem Corp. were the minor children of the Pufahl Brothers, and the Pufahl Brothers held the shares of Adchem Corp. in trust for their minor children pursuant to the New York Personal Property Law Uniform Gifts to Minors Act. (Miller Dep. at 95:9-97:12; see Minutes of First Meeting of Shareholders of Adchem Corp. at 13 (Feb. 19, 1965); see also Minutes of Special Meeting of Board of Directors of Adchem Corp. (Jan. 1, 1966) at 3). The minor children of the Pufahl Brothers never owned any shares or any interest in any of the other Pufahl Defendants. (Miller Dep. at 96:7-25).

On March 31, 1967, the Certificate of Incorporation of Adchem Corp. was amended to change the stock structure of Adchem Corp. (Adchem Certificate of Incorporation; Minutes of a Special Meeting of the Shareholders of Adchem Corp. (Mar. 31, 1967), at 1-7; Miller Dep. at 96:1-14) At that time, the common stock owned by the Pufahl Brothers' minor children (and John Pufahl, Joseph Pufahl's son, who at that time had achieved the age of majority) was converted into preferred stock pursuant to a resolution of the shareholders of Adchem Corp.. At the same time, Adchem Corp. was recapitalized, and the Pufahl Brothers purchased equal shares of a newly-created class of common stock of Adchem Corp. (Minutes of a Special Meeting of the Shareholders of Adchem Corp. (Mar. 31, 1967), at 4-7).

On or before January 7, 1971, John Pufahl purchased a 25% interest in the outstanding common stock of Adchem Corp. (See Minutes of a Special Meeting

of the Board of Directors of Adchem Corp. (Jan. 7, 1971), at 1-2; see also John Pufahl Dep. at 11:14-25).

On June 23, 1975, John and Joseph Pufahl purchased the common stock of Adchem Corp. held by Charles and Herman Pufahl and the preferred stock of Adchem Corp. held by the minor children of Charles and Joseph Pufahl and by Margaret Pufahl, who had reached the age of majority. (Minutes of a Joint Special Meeting of the Stockholders and Board of Directors of Adchem Corp. (June 23, 1975), at 1-6; John Pufahl Dep. at 13:2-25).

Subsequent to 1975, ownership of Adchem stock changed several times, but was always held by John Pufahl, Joseph Pufahl, and Robert Pufahl (also the son of Joseph Pufahl). Today, ownership of Adchem's stock is evenly divided between John Pufahl and Robert Pufahl. (John Pufahl Dep. at 14:22-19:23).

With respect to the management and operation of Adchem Corp., from Adchem Corp.'s incorporation until January 7, 1971, the officers and directors of Adchem Corp. were the Pufahl Brothers. (Minutes of First Meeting of Board of Directors of Adchem Corp. (Feb. 19, 1965), at 6-10; Minutes of a Special Meeting of the Board of Directors of Adchem Corp. (Jan. 7, 1971), at 1). On January 7, 1971, John Pufahl was elected to the Board of Directors and became Vice President of Adchem Corp. (Minutes of a Special Meeting of the Board of Directors of Adchem Corp. (Jan. 7, 1971), at 1-3).

On June 23, 1975, Charles and Herman Pufahl resigned as officers and directors of Adchem Corp. (Minutes of a Joint Special Meeting of the Stockholders and Board of Directors of Adchem Corp. (June 23, 1975), at 1-6).

From June 23, 1975 until approximately 1982, the officers and directors of Adchem Corp. were John and Joseph Pufahl. Robert Pufahl became an officer and director of Adchem Corp. in approximately 1982. (See Minutes of a Special Meeting of the Board of Directors of Adchem Corp. (Oct. 25, 1982)).

14. The Pufahl Brothers were eager to own the properties they leased as they viewed it as a good economic decision. (Miller Dep. at 31:11-23, 70:15-24; 107:15-108:3).

RESPONSE: Disputed. The cited testimony states that Pufahl Realty was "eager to own *options to buy these properties they were renting from the landlords.*" (Miller Dep. at 31:6-20). These options were not owned by the Pufahl Brothers individually, but were held by Pufahl Realty, later called Northern State Realty Corp., and assigned to Northern State Realty Co. (Lease at p.1, ¶ 65; Assignment Agreement between Northern State Realty Corp. and Northern State Realty Co. (May 21, 1973); Miller Dep. at 31:6-20, 74:19-23). An additional portion of the cited testimony states that the deponent did not know why Pufahl Realty wanted to own options to purchase the properties leased by Pufahl Realty. (See Miller Dep. at 107:8-14 ("Q: And why did they want the purchase option? A: You'll have to ask them. Ask Charlie."). Moreover, Pufahl Realty's former attorney's testimony as to the mental state of his clients over 45 years ago is inadmissible hearsay.

15. The Pufahl Brothers were very much interested in creating property ownership for themselves and their families. (Miller Dep. at 74:18-25).

RESPONSE: Disputed. The Pufahl Brothers negotiated options to purchase certain property for Pufahl Realty Corp., later known as Northern State Realty Corp., and one or more of those options were assigned to Northern State Realty Co. At no time did the Pufahl Brothers individually (or their families) hold the options to purchase property that had been negotiated with Jerry Spiegel, and at no time did the Pufahl Brothers create or attempt to create property ownership for themselves and/or their families through purchase options with Jerry Spiegel. (See, e.g., Lease at p.1, ¶ 65; Assignment Agreement between Northern State Realty Corp. and Northern State Realty Co. (May 21, 1973); Miller Dep. at 74:19-23).

16. Landlord did not desire to give a purchase option on the Property and reluctantly acquiesced to the purchase option on the Property after negotiations. (Miller Dep. at 70:15-24).

RESPONSE: Disputed. Jerry Spiegel testified that the option "did not make any difference really one way or the other" to him with respect to negotiating the lease, but that he told Joseph Pufahl that he was "not happy about selling any properties" for tax reasons, and because he "would like to give [the property] to [his] children." (Id. at 32:10-16, 34:3-13). Jerry Spiegel included a purchase option on the Property as the result of arm's length negotiations with Pufahl Realty. (See generally Deposition of Jerry Spiegel, Aug. 16, 1976)

17. The Lease had a term of 20 years from 1966 to 1986. (Lease at page 1).

RESPONSE: Not disputed, but affirmatively state that the term of the Lease started upon the date that the Landlord delivers to the Tenant a certificate of occupancy for the premises, not necessarily in 1966. (Lease at ¶ 36).

18. The Lease contained no restrictions on the Tenant such as hours of operation, the number of employees in the building, or the type, location and quantity of manufacturing equipment to be installed by the Tenant. (See generally, Lease).

RESPONSE: Disputed. Tenant was permitted to "use and occupy the premises *only* for the lamination and coating of papers, textiles and fabrics and for general manufacturing purposes not in violation of the building zone ordinance of the Town of North Hempstead." (Addendum to Lease at ¶ 15 (emphasis added)). Tenant was prohibited from allowing commercial or retail operations on the Property or converting the Property to residential use.. (See id.).

The Lease contained numerous restrictions on the Tenant, such as the covenant that

> "Tenant will not nor will the Tenant permit undertenants or other persons to do anything in said premises, or bring anything into said premises, or permit anything to be brought into said premises or to be kept therein, which will in any way increase the rate of fire insurance on said demised premises, nor use the demised premises or any part thereof, nor suffer or permit their use for any business or purpose which would cause an increase in the rate of fire insurance on said building…." (Lease at ¶ 19).

Tenant was also prohibited from doing any act or making any contract which could lead to any mechanic's lien on the Property (Lease ¶ 62), was prohibited from committing a waste or injury to the Property, and was required to "keep the grass trimmed and maintain the grounds in a presentable condition and … keep

the sidewalks and entrance ways unobstructed and clean and free of rubbish, ice and snow (Lease at ¶ 61, see also Lease at ¶ 58).

19. The Lease allowed Tenant to use the Property for all "general manufacturing purposes not in violation of the building zone ordinance." (Lease Addendum at ¶ 15).

RESPONSE: Disputed. See response to paragraph 18 above: Tenant was permitted to "use and occupy the premises *only* for the lamination and coating of papers, textiles and fabrics and for general manufacturing purposes not in violation of the building zone ordinance of the Town of North Hempstead." (Addendum to Lease at ¶ 15).

20. Tenant had the right and privilege to remove any and all improvements to the Property without Landlord consent. (Lease at ¶ 31).

RESPONSE: Disputed. ¶ 31 of the Lease conditioned Pufahl Realty's right to remove improvements to the premises with a requirement that Speigel be informed, in writing, via certified or registered mail, 30 days in advance of the proposed removal, and that Pufahl Realty first deposit with Spiegel any increase in the security deposit necessary to cover the costs of restoring the premises after removal of improvements. ¶ 31 of the Lease also provided that any such increases in the security deposit "shall in no way release the Tenant from the obligations and liability for restoration and repair of the premises", and ¶ 4 of the Lease prohibited the Tenant from making alterations to the premises without the written consent of Spiegel. (Lease at ¶ 4, 31). These restrictions on Tenant's ability to

improve the premises and remove improvements are inconsistent with the rights and privileges of an owner. (Expert Report of David Tesler, May 5, 2013 ("Tesler Report") at p.4 ¶ X.

Furthermore, ¶ 22 of the Lease states that after Tenant's default or the expiration of the lease term, any trade fixtures or other property that was not removed by Tenant would be deemed abandoned by the Tenant and become the property of the Landlord. (Lease at ¶ 22). This is inconsistent with the rights of a property owner. (Rebuttal Expert Report of David Tesler, Sept. 8, 2013 ("Tesler Rebuttal Report") at p.2 ¶ 2).

Finally, the Tenant was prohibited from doing any act or making any contract which could lead to any mechanic's lien on the Property (Lease at ¶ 62), and could not make alterations on the premises without the Landlord's consent. (Lease at ¶ 4).

21. Landlord did not have any right of early termination at its option. (See generally, Lease).

RESPONSE: Disputed. Spiegel had the right to terminate the Lease if he was unable to obtain a mortgage on the Property within six weeks of the date of the Lease. This right of termination was "for the sole benefit of the Landlord." (Lease ¶ 72). The Lease also granted Spiegel has the right to terminate the Lease if Pufahl Realty did not agree to new or altered terms of the Lease imposed by a mortgagee. (Lease at ¶ 46.) Landlord also had the right to terminate the Lease, at his sole option, in the event of "damage, by fire or other cause, to the building in

which the leased premises are located, without the fault of the Tenant or of Tenant's agents or employees ... if the Landlord shall within a reasonable time decide not to rebuild ...." (Lease at ¶ 5). Landlord's decision not to rebuild the building on the Property subsequent to damage by fire or other cause, thereby terminating the lease, was entirely at Landlord's option. (See id.).

22. The Lease could only terminate early upon the following limited circumstances, all of which were beyond Landlord's control and either in Tenant's exclusive control or the control of third-parties: (1) Tenant's default of the Lease; (2) Pufahl Defendant's exercise of its option to purchase the Property; (3) the building is destroyed by fire; and (4) eminent domain if it substantially affects the ability of Tenant to use its equipment and machinery. (Lease at ¶¶ 5, 8, 47, 65).

RESPONSE: Disputed. (See Response to Paragraph 21, supra). First, Landlord had an early termination right if it did not obtain a mortgage on the Property. This termination right was for the sole benefit of the Landlord and was entirely within Landlord's control. Landlord also had the right to terminate the Lease in the event that Pufahl Realty did not agree to new or altered terms of the Lease imposed by a mortgagee. (See Response to Paragraph 21, supra; Lease at ¶¶ 46, 72).

Second, Landlord's option to terminate the Lease as a result of damage to the premises was not limited to damage by fire, but specifically referred to damage "by fire or other cause". (Lease at ¶ 5). Moreover, Landlord's option to terminate the Lease in the case of damage by fire or other cause arose "if the Landlord shall within a reasonable time decide not to rebuild." (Id.). Landlord's decision not to

rebuild the premises subsequent to damage by fire or other cause is entirely within Landlord's control. (See id.).

Third, Landlord was permitted to terminate the Lease if the Tenant sold, assigned, or mortgaged the Lease without Landlord's consent, or if the Tenant failed to comply with any law applicable to the Property, or if the Tenant "shall file or there be filed against Tenant a petition in bankruptcy or arrangement, or Tenant be adjudicated a bankrupt or make an assignment for the benefit of creditors or take advantage of any insolvency act …." (Lease at ¶ 17).

Finally, to the extent Plaintiffs suggest that the purchase option contained in the Lease belonged to the Pufahl Defendants generally, that allegation is also disputed; the purchase option contained in the Lease belonged solely to Pufahl Realty and was later assigned to Northern State Realty Co. (Lease at p.1 and ¶ 65; Assignment Agreement between Northern State Realty Corp. and Northern State Realty Co. (May 21, 1973)).

23. Pufahl Defendants had the right to assign or sublet the Property. (Lease at ¶ 34).

RESPONSE: Disputed. Only the Tenant (Pufahl Realty Corp., and later Northern State Realty Co.) had the right to assign or sublet the Property. (Lease at p.1 and ¶ 34). These rights were not without restrictions. (See Response to ¶ 24, infra).

24. The Lease contained no restrictions on the right to assign or sublet the Property. (Lease at ¶ 34).

RESPONSE: Disputed. With respect to assignment, Paragraph 34 of the Lease prohibited Tenant from assigning the Lease unless "the assignee assume[d] the terms of this lease agreement on a standard form of lease assignment in recordable form, and on further condition that the Tenant remain liable under the terms of this agreement for the entire lease term." (Lease at ¶ 34). On or about May 24, 1966, Spiegel obtained a mortgage on the Property, and Pufahl Realty agreed to changes in the terms of the Lease required by Prudential Insurance Company, the mortgagee. (Certificate and Agreement between Jerry Spiegel, Pufahl Realty Corp., and the Prudential Insurance Company of America (May 24, 1966), (hereinafter "Mortgage"); see also Lease at ¶ 46 (requiring Tenant to agree to changes in the terms of the Lease required by an institution furnishing a mortgage and permitting Landlord to terminate the Lease if Tenant refused to agree to such changes)). The mortgage prohibited Tenant from assigning "in whole or in part … Tenant's interest in the lease" unless "the assignee assumes the lease and a duplicate original of the instrument of assignment and assumption, in recordable form, be delivered to Prudential and the assignee specifically assumes the obligation imposed by this agreement by an instrument in writing, in recordable form, delivered to Prudential … [and] no assignment of Tenant's interest in the lease, even if permitted by the lease or consented to by the Landlord or Prudential, shall release Tenant from any liability under the lease or this Agreement." (Id. at ¶ 2(f)). Tenant was also *required* to assign the lease to its purchaser or successor in the event of the sale, conveyance, or transference of all or substantially all of its assets or business. (Id. at ¶ 11).

With respect to subletting, the Tenant was prohibited from permitting subtenants "to do anything in said premises, or bring anything into said premises, or permit anything to be brought into said premises or to be kept therein, which will in any way increase the rate of fire insurance on said demised premises, nor use the demised premises or any part thereof, nor suffer or permit their use for any business or purpose which would cause an increase in the rate of fire insurance on said building…." (Lease at ¶ 19).

25. The Tenant had the right to sublet the Property without Landlord's consent. (See Lease at ¶ 34).

RESPONSE: Not disputed, but as stated in the response to paragraph 24, supra, Tenant's right to sublet the Property was not without restrictions. (See response to ¶ 24, supra).

26. Pursuant to the terms of the Lease, Tenant, at its own cost and expense, was responsible for paying all taxes, assessments, insurance and operation and maintenance costs for the Property. (Lease at ¶¶ 2, 19, 28, 30, 35, 36, 37, 44A, 58, 61, 67).

RESPONSE: Disputed. With respect to taxes, Spiegel remained liable for inheritance, succession, and transfer taxes, corporate franchise taxes, and Landlord's withholding and income taxes. (Lease at p.5; Tesler Report at p.4 ¶ IX.; see also January 18, 1966 lease between Pufahl Realty, as tenant, and Jerry

Spiegel, as Landlord, for 710 Summa Avenue, Westbury, NY (the "710 Summa Lease") at ¶ 37[2]).

With respect to insurance, Spiegel was permitted to insure "all plate glass in the demised premises for and in the name of Landlord" and charge the premiums to Tenant as additional rent, but Tenant was not required to purchase plate glass insurance. (Lease at ¶ 9).

Pufahl Realty was required by the Lease to purchase "what is commonly known as Public Liability Insurance and Boiler Insurance, *protecting the Landlord*...." (Lease at ¶ 30 (emphasis added)). Pufahl Realty was also required to notify the Landlord of any proposed changes, cancellations, or amendments in those insurance policies, and to deliver to the Landlord renewals of such insurance policies ten days before their expiration. In the event that Pufahl Realty failed to deliver a renewal of the liability and boiler insurance on the Property, the Landlord could procure its own insurance policy and add the premiums for that insurance to the monthly rent due from the Tenant. (Id.) The requirement to pay premiums for or purchase insurance naming another party as an insured is inconsistent with the rights and privileges of a property owner. (Tesler Report at p.3-4, ¶ VII).

Tenant was also required, as additional rent, to reimburse Landlord for premiums upon fire insurance on the premises. (Lease ¶ 35). The Lease also specified the hazards to be covered in the fire insurance policy on the Property. (Id.). Again, a

[2] The terms of the Lease and the 710 Summa Lease are for the most part identical. Hence, since page 4 of the 89 Frost lease appears to be missing, we will cite to page 4 of the 710 Summa lease for the terms contained therein.

requirement to procure insurance for or pay the insurance premiums of another party (and to insure against specific hazards at that party's demand) is inconsistent with the rights and privileges of an owner. (Tesler Report at p.3-4, ¶ VII). Pufahl Realty (and later Northern State Realty Co.) later procured fire insurance for the Property and other locations naming Jerry Spiegel and affiliates of Jerry Spiegel as insured. (Certified Copy of Allendale Policy #85865, Defendants' Exhibit #39; Schedule of Values as of 3/1/76, Adchem Corp. et al # 85865, AA 04838; Mem. from Ed Cobert to John Pufahl, Jan. 29, 1982, and attachments, AA04841-44; Trial Mem. of Def. Allendale, Northern State Realty Co. v. Jerry Spiegel et al., 10154/76 (N.Y. Sup. Ct. Nassau Cty.), SFSP Response 7 000463-469, at 2; see also Def. Ex. 39, Letter from Roland J. Bonitati, Underwriting Officer, Allendale Mutual Ins. Co., to Adchem Corp., Re: Account No. 1-33713, Policy No. 85865, June 8, 1976).

Tenant was required to purchase rent insurance at its own cost and expense, in an amount specified by the Lease, naming the Landlord as insured and deposited with the Landlord. (Lease ¶ 70).

The Rider to the Lease required the Tenant to include insurance policy endorsements favoring Spiegel on all insurance policies on the Property. (Rider to Lease dated April 1, 1966, between Jerry Spiegel, as Landlord and Pufahl Realty Corp., as Tenant). This is inconsistent with the rights and privileges of a property owner. (Tesler Report at p.3-4, ¶ VII).

With respect to operation and maintenance costs for the Property, the Tenant was prohibited from doing any act or making any contract which could lead to any mechanic's lien on the Property. (Lease ¶ 62).

Moreover, Landlord was obligated to "make all repairs in and to the building hereby leased to the Tenant during the first two years of the lease term, except those repairs which may have been occasioned by act or neglect of the Tenant." (Lease ¶ 39). Landlord was also required to make all structural repairs to the premises, "except such structural repairs as may have been occasioned by any act or neglect of the Tenant", during the entire term of the Lease. (Lease Addendum to Para. #3 and #39). In the original Lease, paragraph 56 permitted the Tenant make repairs that the Landlord would ordinarily be required to make on the Landlord's behalf, though only after giving fifteen days' written notice to Spiegel; however, this paragraph was deleted by the Mortgage, leaving Tenant without the right under the Lease to make repairs that Landlord would have been obligated to make. (See Lease ¶ 56, Mortgage ¶ 12(f)).

Spiegel did in fact make and/or pay for repairs to 89 Frost during the first two years of the Lease, as required by the Lease. (See Letter from Elliot Ira Miller to Jerry Spiegel re: Premises 89 Frost Street, Sept. 13, 1966 ("I am the attorney for Pufahl Realty Corp. the prospective tenant at the above premises. … [M]y client has ascertained that there are substantial defects in the design and construction of the building …. For example, … [v]entilation and air conditioning systems were improperly designed and installed."); see also Letter from Richard Grayson, Jerry

Spiegel Associates, to Richard Holt Plumbing & Heating Corp. re: 89 Frost Street, New Cassel, Nov. 18, 1966 ("Please be advised that the heating and air conditioning systems which you installed are defective … [k]indly attend to this matter without delay."); see also Lease at ¶ 39).

27. There was no diminution or abatement of rent, or other compensation, in the event of inconvenience or discomfort arising from the making of repairs or improvements to the building or to its appliances. (Lease at ¶ 26).

RESPONSE: Not disputed.

28. Tenant had to obtain utilities for the Property and pay for its consumption of fuel, gas, electricity and water. (Lease at ¶ 28).

RESPONSE: Disputed. The Lease requires Tenant to pay for its consumption of fuel, gas, electricity, and water, but does not require Tenant to obtain utilities for the Property. (Lease at ¶ 28).

29. Tenant was solely responsible for insurance cost for liability, casualty and boiler insurance covering personal injury and property damage, and covering the entire leased Property. (Lease at ¶ 30).

RESPONSE: Not disputed, but state in addition that Tenant was required to name Jerry Spiegel as an insured on the insurance policies required by the Lease, and to include endorsements favorable to Spiegel on those policies. (See Response to ¶ 26, supra).

30. Tenant was responsible for paying rent loss insurance. (Lease at ¶ 70).

RESPONSE: Not disputed, but state in addition that Tenant was required to name Jerry Spiegel as an insured on the insurance policies required by the Lease, and to include endorsements favorable to Spiegel on those policies. (See Response to ¶ 26, supra).

31. Tenant was responsible for paying all fire insurance premiums for the Property. (Lease at ¶ 35).

RESPONSE: Not disputed, but affirmatively state that Tenant was required to name Jerry Spiegel as an insured on the insurance policies required by the Lease, and to include endorsements favorable to Spiegel on those policies. (See Response to ¶ 26, supra).

32. Tenant was responsible for reimbursing Plaintiff for all taxes, charges and impositions. (Lease at ¶ 37).

RESPONSE: Disputed. (See Response to ¶ 26, supra).

33. Landlord was not liable for maintenance or repair of heating, plumbing or sprinkler systems or sanitary systems or to make any other repairs, decorations or alterations or to furnish heat, hot water, gas electricity, or any other utility or service. (Lease at ¶ 67).

RESPONSE: Disputed. Landlord was in fact liable for all such repairs during the first two years of the Lease. (Lease at ¶ 39). Landlord was also responsible for all

structural repairs for the entire term of the Lease. (Addendum to Lease at ¶ 4 (Addendum to ¶¶ 3 & 39)); Deposition of Arthur Sanders, Nov. 28, 2012, at 194:10-195:11, 196:1-6).

34. Tenant was responsible for connecting, at its own expense, sewer lines installed and brought to the Property. (Lease at ¶ 44A).

RESPONSE: Disputed. Tenant was under no obligation or responsibility to connect to sewer lines. Paragraph 44A of the Lease states that "[i]t is understood and agreed that *in the event that sewer lines are installed or brought to the demised premises*, the Landlord shall have no obligation to connect the demised premises to such sewer lines, however, *the Tenant may at its option and at its own cost and expense connect to such sewer lines*." (Lease at ¶ 44A (emphasis added)).

35. Tenant was responsible for the removal of rubbish, snow and ice and for landscaping. (Lease at ¶¶ 58, 61).

RESPONSE: Not disputed. The Lease expressly required the Tenant to "keep the grass trimmed and maintain the grounds in a presentable condition and … keep the sidewalks and entrance ways unobstructed and clean and free of rubbish, ice and snow" and prohibits Tenant from committing waste or injury to the Property. (Lease at ¶ 61; see also Lease at ¶ 58). These obligations are inconsistent with the rights and privileges of a property owner.

36. Landlord, as builder of the building on the Property, agreed to "guarantee" the quality of the building constructed on the Property by agreeing to make all repairs to the building during the first two (2) years of the lease term, except repairs occasioned by act or neglect of Tenant. (Lease at ¶ 39).

RESPONSE: Not disputed.

37. After the first two years of the lease term, Landlord was only responsible for making structural repairs to the exterior and interior bearing walls, foundation, floor slab, roof deck and structural steel. Tenant was responsible for all other structural repairs. (Lease at ¶ 39; Lease Addendum at ¶ 4).

RESPONSE: Disputed. (See Response to ¶ 26, supra). Affirmatively state that the Landlord was responsible for all structural repairs not caused by the Tenant's act or negligence. (Deposition of Arthur Sanders, Nov. 28, 2012, at 194:10-195:11, 196:1-6; see also Lease Addendum at ¶ 4;).

38. Pufahl Defendants bore the risk of loss. Pufahl Defendants were not entitled to any compensation for the destruction of the Property by fire or condemnation. (See Lease at ¶¶ 12, 60).

RESPONSE: Disputed. Even if Plaintiffs' characterization of the terms of the Lease is correct, only Tenant Pufahl Realty Corp. (and later assignee Northern State Realty Co.) bore the risk of loss. (See Lease at p.1, Assignment Agreement between Northern State Realty Corp. and Northern State Realty Co. (May 21, 1973); Miller Dep. at 74:19-23).

Per the terms of the Lease, in the case of condemnation that did not affect the building upon the demised premises, Tenant was not entitled to any amount of any aware made in a condemnation proceeding; in the case of condemnation that affected the building demised by the Lease but did not substantially affect the use of Tenant's equipment and machinery in that building, Tenant was entitled to an abatement of rent proportionate to the number of square feet condemned or conveyed; in the case of condemnation that substantially affected the use of Tenant's equipment and machinery, either the Tenant or the Landlord had the right and privilege to terminate the Lease. (Lease at ¶ 47). Tenant's compensation in the case of condemnation was, as appropriate given its status as a tenant and not a landlord or owner, the right to a proportionate abatement of rent or termination of the Lease, unless the condemnation was of a portion of the Property that did not affect Tenant's interest. (See id.; see also Tesler Report at p.3 ¶ VI). Tenant was also entitled to recovery in condemnation proceedings for any taking of Tenant's trade fixtures, but only insofar as its recovery did not interfere with Spiegel's recovery of a condemnation award for the taking of the premises. (Addendum to Lease at ¶ 6).

Per the terms of the Lease relating to damage to the premises by fire or other causes without fault of the Tenant or of Tenant's agents or employees, if the Landlord unilaterally decided not to rebuild the premises, the Lease terminated and the rent was apportioned to the time of the damage. (Lease at ¶ 5). If the Landlord did rebuild the premises, but the damage rendered the premises untenantable in whole or in part, the Lease originally stated that Tenant's rent was

to be apportioned until the damage was repaired. (Id.). This provision was modified by the Mortgage to remove Tenant's right to apportionment of rent in the event of damage that rendered the premises untenantable in whole or in part. (Mortgage at ¶ 12(a); see also Lease at ¶ 46).

Tenant's compensation for damage to the premises by fire or other cause, without fault of the Tenant or of Tenant's agents or employees, was termination of the Lease and apportionment of rent to the time of the damage in the event that the premises were damaged so substantially as to be practically destroyed or if the Landlord decided not to rebuild. Tenant's inability to determine whether to rebuild the premises in the case of damage or to prevent Landlord from terminating all of Tenant's interest in the Property is inconsistent with the rights and privileges of a property owner. (Tesler Report at p.3, ¶ II). Tenant's compensation for damage to the premises by fire or other cause, without fault of the Tenant or of Tenant's agents or employees, also originally included a right to apportionment of rent reflecting the portion of the premises rendered untenantable by damage, but this form of compensation was removed at the mortgagee's insistence.

Nothing in the Lease prohibited Tenant from carrying fire insurance naming itself as an insured in order to protect its interests and reduce its risk. (See Tesler Rebuttal Report at p.8 ¶ 13). Tenant in fact carried fire insurance on the Property naming itself as an insured. (Certified Copy of Allendale Policy #85865, Defendants' Exhibit #39). The Lease, did, however, required that any fire insurance policy on the Property name the Tenant as an assured or to include a

waiver of subrogation for the Tenant in order to bar an assertion by the insurance carrier of subrogation claims against the Tenant, thus minimizing the risk of loss for the Tenant. (Lease at ¶ 35). By the terms of the Lease, Tenant could not completely eliminate the risk that Landlord would terminate Tenant's right to occupy the Property with a unilateral determination that Landlord would not restore the Property. (See Lease at ¶ 5). This inability to prevent termination of Tenant's property rights is inconsistent with the rights and privileges of an owner of property. (Tesler Report at p.3 ¶ II).

39. Landlord was "exempt from any and all liability for any damage or injury to person or property caused by [or] resulting from steam, electricity, gas, water, rain, ice or snow, or any leak or flow from or into any part of said building [or] from any damage or injury resulting or arising from any other cause or happening whatsoever unless said damage or injury be caused by or be due to the negligence of the Landlord." (Lease at ¶ 12).

RESPONSE: Not disputed.

40. Landlord was not liable "whatsoever for any injury or damage to any property or to any person happening on or about the demised premises, nor for any injury or damage to any property of Tenant, or of any other person contained therein." (Lease at ¶ 60).

RESPONSE: Not disputed.

41. There was no diminution or abatement of rent, or other compensation, in the event of inconvenience or discomfort arising from the making of repairs or improvements to the building or to its appliances. (Lease at ¶ 26).

RESPONSE: Not disputed.

42. If part of the Property was condemned, but not the building, the rent would not be abated. (Lease at ¶ 47).

RESPONSE: Disputed. The rent would not abate only in the event that the condemnation of part of the Property did "not affect the building on the demised premises". (Lease at ¶ 47). Condemnation of part of the Property that did not include the building could easily affect the building, for example by affecting the drainage system, loading dock, or street access. See also response to Paragraph 38, supra.

43. Tenant was required to maintain twelve (12) months of rent interruption insurance coverage so that there would be sufficient funds to make rent payments following a fire. (See Lease at ¶ 70).

RESPONSE: Disputed that this provision was exclusively "so that there would be sufficient funds to make rent payments following a fire." In the event of a fire, the Lease provided that the Landlord could unilaterally determine not to rebuild and terminate the Lease, in which case rent would be apportioned to the date of termination and no further rent would be due after the date of termination. (Lease at ¶ 5). The Lease provision addressing rent interruption insurance does not

mention damage due to a fire; instead, it states only that Tenant was required to maintain "rent insurance (extended coverage) in an amount equal to the annual minimum rental hereunder plus the amount of annual real estate taxes...." (Lease at ¶ 70).

44. The rent would not abate following a fire or other casualty rendering the Property uninhabitable. (See Lease at ¶ 70).

RESPONSE: Disputed. The Lease states that if damage to the building "by fire or other cause ... without the fault of the Tenant or of Tenant's agents or employees ... rendered the premises untenantable, in whole or in part, there shall be an apportionment of the rent until the damage has been repaired." (Lease at ¶ 5). Furthermore, if the damage to the building was "so extensive as to amount practically to the total destruction of the leased premises or of the building, or if the Landlord shall within a reasonable time decide not to rebuild," the Landlord could terminate the Lease and the rent would "be apportioned to the time of the damage." (Lease at ¶ 5).

45. Tenant was in exclusive control over the Property and was in exclusive possession of the Property. (Lease at ¶ 60).

RESPONSE: Disputed. During the term of the May 22, 1973 sublease between Northern State Realty Co. and 89 Frost Street Leasing Corp. (hereinafter "Sublease"), Marvex was in exclusive possession of the Property. (See John Pufahl Deposition at 95:18-19.) Moreover, according to the terms of the Sublease,

the Subtenant assumed the terms of the underlying lease, and therefore the Subtenant was in exclusive control over the Property. (Sublease at p.2). Landlord also retained control of the Property in the form of rights to enter and inspect the Property during the term of the Lease (Lease at ¶ 6); to make repairs or alterations to the Property and charge the Tenant for the same (Lease at ¶ 6, 39); to re-enter and re-let the Property if any portion thereof became vacant during the term of the Lease, without releasing the Tenant from liability for any deficiency in rent and the expenses of re-letting the Property (Lease at ¶¶ 8, 23); to eject the Tenant by force or summary proceedings in the case of any default in the provisions of the Lease, and to re-possess or re-let the Property subsequent to such ejectment without releasing the Tenant from liability for any deficiency in rent and the expenses of re-letting the Property (Lease at ¶¶ 8, 13, 23); and to re-enter the premises to perform any of the obligations of the Tenant pursuant to the Lease at the Tenant's expense (Lease at ¶ 66).

46. Landlord did not have any dominion or control over the Property. (Lease at ¶ 67) ("the exercise by Landlord of any of its said rights or privileges [shall not] be considered as an assumption of dominion or control over the demised premises or any portion thereof.").

RESPONSE: Disputed. This clause is an attempt by the Landlord to limit liability, and not an attempt to shift ownership rights and burdens (or actual dominion and control over the Property) to the Tenant. (See Tesler Report at p.4-5, ¶ XIII.). The Landlord retained extensive dominion and control over the Property under the Lease, in the form of rights to enter and inspect the Property

during the term of the Lease (Lease at ¶ 6); to make repairs or alterations to the Property and charge the Tenant for the same (Lease at ¶ 6, 39); to re-enter and re-let the Property if any portion thereof became vacant during the term of the Lease, without releasing the Tenant from liability for any deficiency in rent and the expenses of re-letting the Property (Lease at ¶¶ 8, 23); to eject the Tenant by force or summary proceedings in the case of any default in the provisions of the Lease, and to re-possess or re-let the Property subsequent to such ejectment without releasing the Tenant from liability for any deficiency in rent and the expenses of re-letting the Property (Lease at ¶¶ 8, 13, 23); and to re-enter the premises to perform any of the obligations of the Tenant pursuant to the Lease at the Tenant's expense (Lease at ¶ 66).

47. The provisions in the Lease permitting Landlord to enter and inspect the Property were "made for the purpose of enabling Landlord to be informed as to whether Tenant is complying with the agreements, terms, covenants and conditions hereof, and to do such as acts as Tenant shall fail to do." (Lease at ¶ 60).

RESPONSE: Not disputed. Landlord's right to enter and inspect the premises to ensure that Tenant was complying with its obligations is inconsistent with the argument that Tenant had the rights and privileges of an owner. (Tesler Report at p.4-5, ¶ XIII).

48. Landlord was not allowed to enter the factory without notice to and supervision by Tenant (Lease Addendum at ¶ 11).

RESPONSE: Disputed. Landlord agreed that it would not "enter into the factory portions of the [Property] *for the showing thereof to prospective purchasers and tenants* except after notice to the Tenant and under the Tenant's supervision to the end that the Tenant may protect its operations and trade secrets." (Lease Addendum at ¶ 11 (emphasis added)). Landlord "and Landlord's agents and other representatives" retained their right to enter any part of the Property, including the factory portion, "at all reasonable hours for the purpose of examining the same, or making such repairs or alterations therein as may be necessary …", (Lease at ¶ 6), and to charge the Tenant for such repairs or alterations as additional rent (Lease at ¶ 39); to re-enter and re-let the Property if any portion thereof became vacant during the term of the Lease, without releasing the Tenant from liability for any deficiency in rent and the expenses of re-letting the Property (Lease at ¶¶ 8, 23); to eject the Tenant by force or summary proceedings in the case of any default in the provisions of the Lease, and to re-possess or re-let the Property subsequent to such ejectment without releasing the Tenant from liability for any deficiency in rent and the expenses of re-letting the Property (Lease at ¶¶ 8, 13, 23); and to re-enter the premises to perform any of the obligations of the Tenant pursuant to the Lease at the Tenant's expense (Lease at ¶ 66).

49. Landlord originally proposed a clause in the Lease allowing Landlord to use the easterly wall of the building on the Property to benefit Landlord's adjoining property should a building be constructed on the adjoining lot. (See Lease at ¶ 73). Pufahl Defendants objected to this clause and it was stricken from the lease. (See Lease at ¶ 73).

RESPONSE: Disputed. Landlord has no adjoining property to the east of the Property; immediately to the east of the Property is Frost Street, a public road. (OU-1 ROD at p.24-25, figs. 2, 3). This provision in the Lease, word for word, appears in and was also deleted from the 710 Summa Lease, and was originally intended to comprise a portion of that lease or another lease used as a form for the 710 Summa lease. (Compare Lease at ¶ 73, pp. 21-22 with 710 Summa Lease at ¶ 73, pp. 21-22).

Moreover, to the extent that paragraph 73 of the Lease was in fact objected to by any party, it was objected to by Pufahl Realty Corp., the party that negotiated the Lease with Jerry Spiegel, and not by the Pufahl Defendants generally. (See Deposition of Jerry Spiegel, Aug. 16, 1976 ("Spiegel Dep."), at 4:22-5:25, 13:3-14:7).

50. Tenant had the right to contest charges, liens, assessments and other impositions with the appropriate governmental department. (Lease at ¶ 36).

RESPONSE: Not disputed. In addition, Landlord had the right to contest charges, liens, assessments and other impositions with the appropriate governmental department. (See Lease at p.5).

51. Pufahl Defendants had the option to purchase the Property in the twelfth (12th) year of the lease term for $490,000.00. (Lease at ¶ 65).

RESPONSE: Disputed. Only the Tenant, Pufahl Realty Corp. had the option to purchase the Property in the twelfth year of the lease term, and only in the case

that it was in full compliance with the terms of the Lease. (Lease at p.1 and ¶ 65). Pufahl Realty, then known as Northern State Realty Corp., assigned that option to Northern State Realty Co. in 1973. (Assignment Agreement between Northern State Realty Corp. and Northern State Realty Co. (May 21, 1973). Moreover, Jerry Spiegel stated in a filing in Nassau County Supreme Court that "since the lease terminated in May of 1976 upon notice by the landlord not to rebuild, the option never came into existence since it can only be requested in the twelfth year of the lease." (Answer at p.4, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County) (Filed July 1976)).

52. The replacement cost of the building (excluding the land and foundations) was $820,000 when the building burned down in 1976. (Complaint at ¶¶ 8—9, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County) (Filed July 1976)).

RESPONSE: Disputed. Admit that Northern State Realty Co. alleged that the fire insurance policy in effect at the time of the 1976 fire provided for paying Spiegel "the cost of restoring the premises up to $820,000 in the event of the destruction by fire of the building thereon should Spiegel determine to restore such building, and, if not, the then depreciated value of the building before its destruction", and affirmatively state that Jerry Spiegel, in his answer, denied this allegation. (Compare Complaint at ¶¶ 8, 14, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County) (Filed July 1976) with Answer of Jerry Spiegel, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County) at 1-2 ("Denies each and every allegation of paragraph "8" of the

complaint except defendants admits that plaintiff was a tenant in property owned by him as landlord.... Denies each and every allegation contained in paragraph "14" of the complaint ....).

Affirmatively state that, since Jerry Spiegel unilaterally determined not to rebuild the building at 89 Frost following the 1976 fire, the insurance policy in place at the time of the fire entitled him only to the depreciated value of the building before its destruction. A Property Control Card for 89 Frost Street dated 1976 contains the following notation for the assessed value of 89 Frost:

Assessed Value:

27,350 Land

116,171 Building

143,521

(Spiegel Associates Property Control Card for 89 Frost, 1976).

53. In 1973, Northern State Realty Co. entered into a sublease (hereinafter "Sublease") with 89 Frost Property Corp. (Sublease between Northern State Realty Co. and 89 Frost Street Leasing Corp. (May 22, 1973)).

RESPONSE: Not disputed, but affirmatively state that the Sublease was with an entity called 89 Frost Street Leasing Corp., not 89 Frost Street Property Corp.

54. Northern State Realty Corp assigned its rights under the Lease to Northern State Realty Co. prior to the negotiation and execution of the Sublease. (Assignment Agreement

between Northern State Realty Corp. and Northern State Realty Co. (May 21, 1973); John Pufahl Dep. at 64:12-17; Charles Pufahl Dep. at 35:12-24; Miller Dep. at 104:6-21).

RESPONSE: Not disputed that Northern State Realty Corp. assigned its rights under the Lease to Northern State Realty Co. prior to the execution of the Sublease. (See Assignment Agreement between Northern State Realty Corp. and Northern State Realty Co. (May 21, 1973); Sublease between Northern State Realty Co. and 89 Frost Street Leasing Corp. (May 22, 1973)). Affirmatively state that there is no evidence in the record as to whether the negotiation of the Sublease began before or after the assignment.

55. 89 Frost Property Corp. was an affiliated company to Marvex Corp. (hereinafter "Marvex or "Subtenant"), the party that occupied and conducted textile manufacturing activities at 89 Frost Street between 1973 and 1976. (Rental Invoice at AA00189 (Dec. 24, 1975); Fred Margolin Dep. at 8:21-9:10; 10:4-8, Sept. 16, 2013; Charles Pufahl Dep. at 51:2-4, 70:11-16; Miller Dep. at 117:7-9; Dieter Kannapin Dep. at 8:21-9:6, Oct. 8, 2013).

RESPONSE: Not disputed that Marvex Processing and Finishing Corp. (hereinafter "Marvex" or "Subtenant" occupied and conducted textile manufacturing activities at 89 Frost Street between approximately June 1973 and May 30, 1976. Marvex was not an affiliated company to 89 Frost Street Property Corp.; affirmatively state that it is unknown whether Marvex was an "affiliated company" to 89 Frost Street Leasing Corp. (See Fred Margolin Dep. at 27:4-12, 56:13-25).

56. Marvex occupied the 89 Frost Street Property and conducted operations at the Property pursuant to the terms of the Sublease. (Margolin Dep. at 8:21-9:10, 10:4-8; Charles Pufahl Dep. at 51:2-4, 70:11-16; Miller Dep. at 117:7-9).

RESPONSE: Not disputed.

57. Landlord had no involvement with the Sublease. (John Pufahl Dep. at 228:2—6, Apr. 16, 2013; Charles Pufahl Dep. at 105:22—106:10; Margolin Dep. at 9:14—24).

RESPONSE: Disputed whether Landlord and/or Landlord's agents had involvement with the Sublease and the operations of the Subtenant at the Property. (See response to paragraph 59, infra). Not disputed that Landlord had no involvement with the negotiation of the Sublease.

58. Landlord had no involvement with the placement of the Subtenant in the Property. (John Pufahl Dep. at 228:2-6; Charles Pufahl Dep. at 105:22-106:10; Margolin Dep. at 9:14-24).

RESPONSE: Not disputed.

59. There is no documentation or information indicating that Landlord was notified of the sublease of the Property to Marvex. (John Pufahl Dep. at 228:2-6; Charles Pufahl Dep. at 105:22-106:10; Margolin Dep. at 9:14-24).

RESPONSE: Disputed. First, the Landlord was supplied with liability insurance coverage for the Property by Marvex no later than May 8, 1974. (See Letter from Jerry Spiegel (by Richard Grayson, counsel) to Joseph G. Gray & Co., Inc., Oct. 31, 1978 ("The basic liability coverage was supplied to us by the subtenant

Marvex Processing & Finishing Corp. through Cobert & Cobert, Inc. representing Royal Globe Insurance Co. The policy number was PYN303110, covering the period May 8, 1974 to May 8, 1977."). This provided constructive notice of the sublease to Marvex[3] by no later than that date. The Landlord also received constructive notice of the Sublease via liability coverage procured by Marvex or an affiliated company in or shortly after June of 1973. (See Letter from Ed Cobert to Paul Margolin, Syntex, re: 89 Frost Street – Liability Insurance, etc. (June 11, 1973); Margolin Dep. at 8:3-17 (stating that Fred Margolin managed Syntex); see also Resume of Lease, 89 Frost Street, Westbury, N.Y., between Northern State Realty Co. and 89 Frost Street Leasing Corp., at p.2; Lease at ¶ 30 (requiring notice to Landlord of changes in liability insurance covering the Property); Sublease at pp. 1-2 (making terms of underlying Lease binding upon Sublessee), ¶¶ (c)1 (stating that "Landlord" in section 30 of the Lease shall be deemed to refer to Sublessor and Jerry Spiegel) and (d)X (permitting Sublessee to occupy premises provided that Sublessee "immediately prior to such occupancy provide liability insurance as in this lease required.")).

Second, a handwritten note from Spiegel Associates' files, produced along with documents dated in the 1970s, reads "Fred Margolin Home # 921-4936 89 Frost Street". (Bates # 15625). Fred Margolin was the principal of Marvex. (Margolin Dep. at 7:7-11). This note indicates that Spiegel Associates was aware of Marvex's presence and activities at the Property.

[3] As stated in the response to Paragraph 53, supra, the Sublease was in fact with 89 Frost Street Leasing Corp., not Marvex. Marvex occupied the Property pursuant to the Sublease. It is unknown whether Marvex separately subleased the Property from 89 Frost Street Leasing Corp.

Third, Spiegel Associates hired John Fagan of Title Guarantee Co., a title closer, to record the Lease with the Nassau County Clerk upon receiving notice of the Sublease on June 28, 1973. (See Memorandum from John Fagan to Sidney Lipsey, Jerry Spiegel Associates, June 28, 1973).

Fourth, on June 23, 1976, Spiegel Associates sent a letter to Marvex at 89 Frost Street informing Marvex that the Lease (and, therefore, the Sublease) had been terminated and demanding that Marvex remove its property from the premises. (Letter from Richard Grayson, Spiegel Associates, to Marvex Processing & Finishing Corp., June 23, 1976). This letter indicates that Spiegel was aware of Marvex's subtenancy.

Finally, Jerry Spiegel and Spiegel Associates had the right to enter and inspect the Property at all times during the Sublease. (Lease at ¶ 6). Jerry Spiegel and/or Spiegel Associates and/or their agents regularly inspected the Property during the Sublease. (See Sanders Dep. at 176:14-177:8; Werfel Dep. at 134:20-135:2).

60. Landlord was not requested to consent to the sublet of the Property to Subtenant and did not consent to the sublet of the Property to Subtenant. (John Pufahl Dep. 228:7-9).

RESPONSE: Disputed. It is unknown whether Landlord expressly consented to the Sublease. (John Pufahl Dep. 228:7-9).

61. Subtenant agreed to pay $113,100 in annual base rent for the first two years and $121,800 in annual base rent thereafter to the Pufahl Defendants from 1975 to 1986. (Sublease at page 2).

RESPONSE: Disputed that Subtenant agreed to pay rent to the Pufahl Defendants. Subtenant agreed to pay rent only to Northern State Realty Co. (Sublease at p.1).

62. Tenant paid Landlord $55,565 in annual rent under the Lease. (See Lease at ¶¶ 33, 38). Therefore, all of the profit derived from the Sublease was received and retained solely by Tenant. The gross profit realized by Tenant pursuant to the Sublease amounted to approximately $57,500 per year for the first two years and $66,000 per year thereafter. (See Sublease at 2). Landlord did not share in any of the profits derived by the Tenant from the Sublease of the Property. (See Lease at ¶ 38; See Sublease at 2).

RESPONSE: Not disputed.

63. The Sublease was for a term of the balance of the Lease. (See Sublease at page 1).

RESPONSE: Not disputed.

64. Pursuant to the terms of the Sublease, the Pufahl Defendants agreed to expand the current septic system by adding three new leaching sections in the drainage system. (Sublease at page 7).

RESPONSE: Disputed. First, only Northern State Realty Co. was a party to the Sublease. (Sublease at p.1). Second, there is no evidence that the reference to

"install[ation of] three leaching sections in the drainage pool" on page 7 of the Sublease referred to an expansion of the septic system as opposed to a repair of the existing septic system or a repair of expansion of the existing system of dry wells for storm water drainage on the Property. (See Charles Pufahl Deposition at 105:2-21; John Pufahl Deposition at 227:14-25; Margolin Deposition at 28:13-29:15). The septic system at the Property was designed and installed by Jerry Spiegel and/or his agents. (Sanders Dep. at 181:24-182:18; Werfel Dep. at 133:20-25). The Landlord required that the Tenant perform repairs on the drainage system at the Property as part of the Lease. (See Lease at ¶ 67). Furthermore, the Rider to the Sublease specifically granted the sublessee the right to complete the installation of leaching sections in the drainage pool. (Rider to Sublease at ¶ 4).

65. The Pufahl Brothers were aware of the use of PCE by Marvex at the facility. (John Pufahl Dep. at 90:3—14; Charles Pufahl Dep. at 54:9—17; Margolin Dep. at 14:24—15:9; Bernard T. Delaney Expert Opinion at 5 (Oct. 2013); Letter from Daniel Riesel, legal counsel for Adchem Corp., to New York State Department of Environmental Conservation, at page 3 (Aug. 2, 1996)).

RESPONSE: Disputed. The evidence only establishes that only John Pufahl, and perhaps Joseph Pufahl, knew of Marvex's use of PCE during Marvex's subtenancy, and then only after Marvex had already begun operation. In fact, Marvex's use of a dry cleaning machine that utilized PCE did not begin until approximately twelve year to eighteen months after the beginning of the Sublease.

(John Pufahl Dep. at 90:3-91:17, 92:6-20, Margolin Dep. at 93:7-16, 104:9-106:3; see also Charles Pufahl Dep. at 54:4-17; Margolin Dep. at 14:24-15:9; Bernard T. Delaney Expert Opinion at 5 (Oct. 2013); Letter from Daniel Riesel, legal counsel for Adchem Corp., to New York State Department of Environmental Conservation, at page 3 (Aug. 2, 1996)). There is no evidence that Herman Pufahl had any knowledge of Marvex's use of PCE, or that Charles Pufahl knew of Marvex's use of PCE during Marvex's subtenancy.

66. John Pufahl observed the operations of Marvex utilizing PCE at the Property. (John Pufahl Dep. at 88:23—90:17, 93:5—17).

RESPONSE: Not disputed.

67. The Pufahl Brothers and John Pufahl periodically visited the Property during the term of the Sublease. During some of these visits, the use of PCE was observed. (John Pufahl Dep. at 93:24—94:10).

RESPONSE: Disputed. There is no evidence that Charles or Herman Pufahl ever visited the Property during the term of the sublease. (See Charles Pufahl Dep. at 105:17-21). The evidence establishes only that John and/or Joseph Pufahl visited the Property; these visits were not periodically, but were "closer to annually than" "weekly [or] monthly". (John Pufahl Dep. at 93:24-94:12). There is no evidence that anyone other than John Pufahl observed the use of PCE at the Property during the term of the Sublease. (See John Pufahl Dep. at 89:2-93:17).

68. The Pufahl Defendants were aware of the use of PCE at the Property by the Subtenant. (John Pufahl Dep. at 93:24-94:10).

RESPONSE: Disputed. As stated above in the Response to ¶ 66, the evidence only establishes that only John Pufahl, and perhaps Joseph Pufahl, knew of Marvex's use of PCE during Marvex's subtenancy, and then only after Marvex had already begun operation. (John Pufahl Dep. at 90:3-91:17, 92:6-20, Margolin Dep. at 175:18-22; see also Charles Pufahl Dep. at 54:4-17; Margolin Dep. at 14:24-15:9; Bernard T. Delaney Expert Opinion at 5 (Oct. 2013); Letter from Daniel Riesel, legal counsel for Adchem Corp., to New York State Department of Environmental Conservation, at page 3 (Aug. 2, 1996)). At the time, John and/or Joseph Pufahl were acting on behalf of Northern State Realty Co., not the Pufahl Defendants generally or any other of the Pufahl Defendants specifically. (John Pufahl Dep. at 67:9-20, 90:12-24, 93:24-94:12; 97:3-12).

69. There is no evidence in the record that Landlord or anyone from Jerry Spiegel Associates [fn: Jerry Spiegel Associates was the real estate management firm of Jerry Spiegel at all relevant times.] visited the Property or were aware of the activities of the Subtenant at the Property. (John Pufahl Dep. at 228:2-6; Charles Pufahl Dep. at 105:22-106:10; Margolin Dep. at 9:14-24).

RESPONSE: Disputed. First, Jerry Spiegel and Spiegel Associates had the right to enter and inspect the Property at all times during the Sublease. (Lease at ¶ 6). Jerry Spiegel and/or Spiegel Associates and/or their agents regularly inspected the

Property during the Sublease. (See Sanders Dep. at 176:14-177:8; Werfel Dep. at 134:20-135:2).

Second, Spiegel Associates' Property Control Cards for 89 Frost Street from November 1975 show payments to "Park Lee Fence", "B&B Paving", "Kuno Steel", "Old Jim Const[ruction]", and several other entities, while previous months show payments only to Prudential Insurance Company (the mortgagee of the Property) and the Westbury Water District. The payments for November 1975 are designated "chain link fence" and "Capital Improvement". Additional payments shown on Spiegel Associates' Property Control Cards for December 1975 show payments to "Island Carting" and "Kammerer Roofing". Again, these payments are designated as "Capital Improvements.", as are payments to "Behi Iron Works" in February and March of 1976. (Spiegel Associates, Property Control Card, 89 Frost, 1975; Spiegel Associates, Property Control Card, 89 Frost, 1976). These Property Control Cards show that Landlord, or Landlord's agents at Spiegel Associates, was present at the Property during Marvex's sublease.

Third, a handwritten note from Spiegel Associates' files, produced along with documents dated in the 1970s, reads "Fred Margolin Home # 921-4936 89 Frost Street". (Bates # 15625) Fred Margolin was the principal of Marvex. (Margolin Dep. at 7:7-11). This note indicates that Spiegel Associates was aware of Marvex's presence and activities at the Property.

Fourth, the Landlord was supplied with liability insurance coverage for the Property by Marvex no later than May 8, 1974. (See Letter from Jerry Spiegel (by Richard Grayson, counsel) to Joseph G. Gray & Co., Inc., Oct. 31, 1978 ("The basic liability coverage was supplied to us by the subtenant Marvex Processing & Finishing Corp. through Cobert & Cobert, Inc. representing Royal Globe Insurance Co. The policy number was PYN303110, covering the period May 8, 1974 to May 8, 1977."). This provided constructive notice of the sublease to Marvex[4] by no later than that date. The Landlord also received constructive notice of the Sublease via liability coverage procured by Marvex or an affiliated company in or shortly after June of 1973. (See Letter from Ed Cobert to Paul Margolin, Syntex, re: 89 Frost Street – Liability Insurance, etc. (June 11, 1973); Margolin Dep. at 8:3-17 (stating that Fred Margolin managed Syntex); see also Resume of Lease, 89 Frost Street, Westbury, N.Y., between Northern State Realty Co. and 89 Frost Street Leasing Corp., at p.2; Lease at ¶ 30 (requiring notice to Landlord of changes in liability insurance covering the Property); Sublease at p. 1-2 (making terms of underlying Lease binding upon Sublessee), ¶¶ (c)1 (stating that "Landlord" in section 30 of the Lease shall be deemed to refer to Sublessor and Jerry Spiegel) and (d)X (permitting Sublessee to occupy premises provided that Sublessee "immediately prior to such occupancy provide liability insurance as in this lease required.")).

[4] As stated in the response to Paragraph 53, supra, the Sublease was in fact with 89 Frost Street Leasing Corp., not Marvex. Marvex occupied the Property pursuant to the Sublease. It is unknown whether Marvex separately subleased the Property from 89 Frost Street Leasing Corp.

Fifth, Spiegel Associates hired John Fagan of Title Guarantee Co., a title closer, to record the Lease with the Nassau County Clerk upon receiving notice of the Sublease on June 28, 1973. (See Memorandum from John Fagan to Sidney Lipsey, Jerry Spiegel Associates, June 28, 1973).

Finally, on June 23, 1976, Spiegel Associates sent a letter to Marvex at 89 Frost Street informing Marvex that the Lease (and, therefore, the Sublease) had been terminated and demanding that Marvex remove its property from the premises. (Letter from Richard Grayson, Spiegel Associates, to Marvex Processing & Finishing Corp., June 23, 1976). This letter is another indication that Spiegel was aware of Marvex's subtenancy.

It is not disputed that Spiegel Associates was the real estate management firm of Jerry Spiegel, and later the Plaintiffs, at all relevant times.

70. The Pufahl Defendants were aware that the Property was on a private septic and not a municipal sewer system. (Charles Pufahl Dep. at 85:5-12). Under the terms of the Sublease, the Pufahl Defendants agreed to expand the septic system by the addition of three new leaching sections in the drainage system. (Sublease at page 7).

RESPONSE: Disputed. Charles Pufahl's cited testimony on this point is as follows:

"Q: Did the facility have a connection to the municipal sewer system?

A: I don't know that, I think there were septic systems, I don't know.

Q: Would the wash waste from this machine be disposed in that septic system?

A: Whatever the system was it would have gone into."

(Charles Pufahl Dep. at 85:5-12). Mr. Pufahl's statements clearly establish that he did not know whether the Property was on a private septic or a municipal sewer system. No other evidence exists that would establish awareness of the private septic system at the Property by the Pufahl Brothers or any of the individual Pufahl Defendants. (See John Pufahl Dep. at 227:14-25; Charles Pufahl Dep. at 105:2-11).

Second, only Northern State Realty Co. was a party to the Sublease. (Sublease at p. 1). Moreover, there is no evidence that the reference to "install[ation of] three leaching sections in the drainage pool" on page 7 of the Sublease referred to an expansion of the septic system as opposed to a repair of the existing septic system or a repair of expansion of the existing system of dry wells for storm water drainage on the Property. (See Charles Pufahl Deposition at 105:2-21; John Pufahl Deposition at 227:14-25; Margolin Deposition at 28:13-29:15). The septic system at the Property was designed and installed by Jerry Spiegel and/or his agents. (Sanders Dep. at 181:24-182:18; Werfel Dep. at 133:20-25). The Landlord required that the Tenant perform repairs on the drainage system at the Property as part of the Lease. (See Lease at ¶ 67). Furthermore, the Rider to the Sublease specifically granted the sublessee the right to complete the installation of leaching sections in the drainage pool. (Rider to Sublease at ¶ 4).

71. The Property was not on municipal sewer during the Tenant's occupancy of the Property. (Charles Pufahl Dep. at 85:5-12; See Sublease at page 7). The expansion of the septic system by Tenant for the Subtenant was an expansion of the on-site septic system that manufacturing waste was discharged into, resulting in the creation of the contamination that exists on the Property. (See Source Area Delineation Summary Report: 89 Frost Street, Westbury, Nassau County, New York, at 3-4 (Roux Associates, Inc., May 3, 2012); See Draft Focused Feasibility Study: Frost Street Site, Westbury, New York, at 1-2, 1-6, 2-5, 2-9 (EnSafe, Inc., Aug. 2012)).

RESPONSE: It is not disputed that the Property was not connected to the municipal sewer during the Lease. Every other allegation in paragraph 71 is unsupported by evidence and is disputed as follows:

First, there is no evidence that the reference to "install[ation of] three leaching sections in the drainage pool" on page 7 of the Sublease referred to an expansion of the septic system as opposed to a repair of the existing septic system or a repair or expansion of the existing system of dry wells for storm water drainage on the Property. (See Charles Pufahl Deposition at 105:2-21; John Pufahl Deposition at 227:14-25; Margolin Deposition at 28:13-29:15). The septic system at the Property was designed and installed by Jerry Spiegel and/or his agents. (Sanders Dep. at 181:24-182:18; Werfel Dep. at 133:20-25). The Landlord required that the Tenant perform repairs on the drainage system at the Property as part of the Lease. (See Lease at ¶ 67).

Second, there is no evidence that the work referenced in the Sublease as "install three leaching sections in the drainage pool" was actually performed. (See Charles Pufahl Deposition at 105:2-21; John Pufahl Deposition at 227:14-25; Margolin Deposition at 28:13-29:15).

Third, there is no evidence that, if the work referenced in the Sublease as "install three leaching sections in the drainage pool" was in fact performed, it was performed by Tenant and not by Subtenant, since the Sublease permitted the Subtenant to perform the work. (Rider to Sublease at ¶ 4; see also Charles Pufahl Deposition at 105:2-21; John Pufahl Deposition at 227:14-25; Margolin Deposition at 28:13-29:15).

Fourth, there is no evidence that the Subtenant deliberately discharged manufacturing waste into the on-site septic system in the ordinary course of its operations. (See Margolin Dep. at 34:6-21; see also Kannapin Dep. at 50:21-52:22).

Finally, and most importantly, it is disputed that, if any work was in fact performed on the septic system by Tenant for the Subtenant, that the Tenant's work resulted in the contamination present at the Property. The Sublease stated that Tenant would "install three leaching sections in the drainage pool." (Sublease at 7). There is no evidence that the PCE contamination present at the Property was released into only a single drainage pool or leaching pool where work might have

been done by the Tenant, as opposed to the multiple drainage pools, cesspools, and leaching pools that were installed by Jerry Spiegel and/or his agents. (See, e.g., Draft Focused Feasibility Study: Frost Street Site, Westbury, New York, (EnSafe, Inc., Aug. 2012) at 1-2, 1-6, 2-5, 2-9 ("Data suggest that CVOCs at the Frost Street site were introduced into the subsurface via *any of a number of wet well/dry well/cesspool features onsite*") (emphasis added); Source Area Delineation Summary Report: 89 Frost Street, Westbury, Nassau County, New York (Roux Associates, Inc., May 3, 2012), at 8 ("PCE was detected in 50 of the 62 soil samples … there are 15 soil boring locations with levels of PCE that exceed the soil standards …."); Sanders Dep. at 181:24-182:18 (discussing the fact that Jerry Spiegel and/or his agents designed and installed the system of drywells and cesspools that caused the release of PCE into the subsurface at the Property). To the extent that Plaintiffs suggest that the isolated concentrations of PCE indicative of DNAPL that are present immediately above a clay layer at approximately 45-50 feet below ground surface at the Frost Street Sites indicate that PCE was discharged in a dry well or cesspool directly above the locations where those DNAPL-indicative concentrations were found, that reading of the evidence is scientifically unsupported and founded upon multiple misconceptions of PCE behavior in the subsurface. (See Expert Report of Robert D. Mutch, Jr. (July 22, 2013), at 1-4, 2-1—2-6, 2-14—2-20). Moreover, concentrations of PCE indicative of DNAPL have been found at the Property below numerous possible surface release points. (See, e.g., Draft Focused Feasibility Study: Frost Street Site, Westbury, New York (EnSafe, Inc., Aug. 2012) at 1-2, 1-6, 2-5, 2-9 ("Data

suggest that CVOCs at the Frost Street site were introduced into the subsurface via *any of a number of wet well/dry well/cesspool features onsite*") (emphasis added)).

The contamination present at the Property is the result of the use and release of PCE by Marvex, chiefly through an act of arson in 1976 that caused the destruction of an above-ground storage tank containing PCE, a continuous dry cleaning machine that used PCE and an associated solvent still, and possibly drums containing spent PCE or still bottoms containing spent PCE. (Delaney Report at 2, 4-5, 15-18; see John Pufahl Dep. at 96:2-14). Marvex's release(s) of PCE would have entered the subsurface through the system of floor drains and cesspools/drywells present at the Property from 1973-76, a system that was designed and installed by Jerry Spiegel and/or his agents. (Delaney Report at 15-18; see also Sanders Deposition at 181:24-182:18). Hence, even if an expansion of the septic system took place and even if manufacturing waste was discharged into the septic system by the Subtenant (for which there is no evidence), the contamination present at the Property is the result of the 1976 arson that destroyed Marvex's dry cleaning machine and the associated solvent distillation system and storage tank of PCE, causing a catastrophic release of PCE to the subsurface. (Delaney Report at 15-18). The release of PCE to the subsurface would have occurred in the fire due to the fact that Jerry Spiegel and/or his agents constructed an on-site septic system to receive manufacturing waste (Sanders Dep. at 181:24-

182:18; Werfel Dep. at 133:20-25), irregardless of whether that system was repaired or expanded by the Tenant. (See Delaney Report at 15-18).

72. Through its manufacturing activity, Marvex contributed PCE to the Property. (Bernard T. Delaney Expert Opinion at 5, 16, 18, 21 (Oct. 2013); See Margolin Dep. at 15:2-9; See Charles Pufahl Dep. at 54:9-17; See Kannapin Dep. at 16:18-24).

RESPONSE: Disputed. The principal of Marvex and an employee of Marvex testified that Marvex's dry cleaning machine was not connected to the on-site septic system that Plaintiffs allege is the source of PCE contamination at the Property. (See Margolin Dep. at 34:6-21; see also Kannapin Dep. at 50:21-52:22).

Disputed that the cited testimony by Charles Pufahl states or implies that Marvex contributed PCE to the Property through its manufacturing activity. (See Charles Pufahl Dep. at 54:9-17).

73. Marvex also contributed PCE to the Property following a fire that destroyed the building on the Property, dry cleaning equipment and storage tanks. (Bernard T. Delaney Expert Opinion at 5, 16, 18, 21 (Oct. 2013)).

RESPONSE: Not disputed.

74. On May 30, 1976, a fire destroyed the Property. (Letter from Jerry Spiegel to Northern State Realty Co. (June 24, 1976); Miller Dep. at 75:4).

RESPONSE: Not disputed.

75. Following the fire, Jerry Spiegel terminated the Lease. (Letter from Jerry Spiegel to Northern State Realty Co. (June 24, 1976); Miller Dep. at 75:15-24).

RESPONSE: Not disputed.

76. Tenant sued Landlord seeking to enforce the option contained in the Lease to purchase the Property. (Complaint at ¶ 12, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County) (Filed July 1976); Miller Dep. at 75:25—77:4).

RESPONSE: Disputed. Tenant sought a declaratory judgment stating that the option was not terminated and could be exercised pursuant to its terms; in the alternative, Tenant sought a judgment directing that the fire insurance proceeds be issued to Tenant directly, or to Jerry Spiegel "under circumstances assuring they will be used only to restore and replace the building located at the premises." (Complaint at ¶¶ 12, 18, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County) (Filed July 1976).

77. The Tenant alleged in the lawsuit that the value of the Property was up to $820,000 exclusive of the value of the land and foundation. (Complaint at ¶¶ 8—9, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County) (Filed July 1976)).

RESPONSE: Disputed; see response to paragraph 52, above.

78. The litigation was settled with Jerry Spiegel paying the Pufahl Defendants $75,000 to terminate their purchase option rights under the Lease. (Settlement Agreement Stipulation, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County 1976) (Apr. 20, 1977); Miller Dep. at 76:18-77:4).

RESPONSE: Disputed. First, the $75,000 payment was by Jerry Spiegel to Northern State Realty Co., not the Pufahl Defendants. (Miller Dep. at 116:5-14; Check # 1805 from Jerry Spiegel to Northern State Realty Co., re: 89 Frost St., Westbury, NY, dated May 18, 1977, in the amount of $75,000; see also Settlement Agreement Stipulation, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County 1976) (Apr. 20, 1977), at 3). Moreover, the option was held by Northern State Realty Co., not by the Pufahl Defendants generally. (Lease at p.1 and ¶ 65; Assignment Agreement between Northern State Realty Corp. and Northern State Realty Co. (May 21, 1973).

Second, the agreement regarding the payment of $75,000 to Northern State Realty Co. specifically states that the $75,000 payment and the stipulation of settlement in the 1976 litigation were received in consideration of a limited release executed in favor of Jerry Spiegel, individually and as Executor of the Last Will and Testament of Jacob Gellman, deceased, Bertha Spiegel, and Hauppauge Building Corp. as Releasees. (Agreement between Pufahl Realty Corp., Joseph Pufahl, Charles Pufahl, and Herman Pufahl, partners, doing business as Northern State Realty Co., Northern State Realty Corp., Lincoln Processing Corp., and Adchem Corp., as Releasors, and Jerry Spiegel, individually and as Executor of the Last

Will and Testament of Jacob Gellman, Bertha Spiegel, and Hauppauge Building Corp., as Releasees (May 18, 1977) ("Release to Spiegel"), at pp. 1-2).

Finally, the attorney representing the Tenant in the litigation specifically stated that the Tenant was "being paid to settle a lawsuit [c]oncerning the right of Northern State to exercise the option", and not for the value of the option to purchase the Property. (Miller Dep. at 116:16-18). According to the Landlord, "the [purchase] option never came into existence since it can only be requested in the twelfth year of the lease" and Spiegel had terminated the lease in the tenth year. (Answer, Northern State Realty Co. v. Jerry Spiegel, et al., No. 10154/76 (Sup. Ct., Nassau County) (Filed July 1976), at p.4).

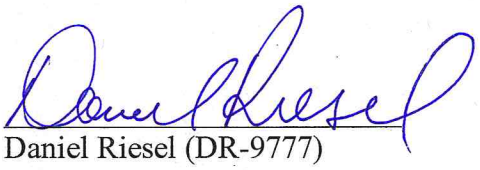
79. The attorney representing the Tenant in the litigation recalled that the $75,000 payment by Landlord to the Pufahl Defendants was "compensation for not having the real estate." (Miller Dep. at 77:1-4).

RESPONSE: Disputed. First, the $75,000 payment was by Jerry Spiegel to Northern State Realty Co., not the Pufahl Defendants. (Miller Dep. at 116:5-14; Check # 1805 from Jerry Spiegel to Northern State Realty Co., re: 89 Frost St., Westbury, NY, dated May 18, 1977, in the amount of $75,000).

Second, the attorney representing the Tenant in the litigation specifically stated that the Tenant was "being paid to settle a lawsuit … [c]oncerning the right of Northern State to exercise the option" by receipt of the $75,000. (Miller Dep. at 116:16-18).

Dated: November 20, 2013
New York, NY

SIVE, PAGET & RIESEL, P.C.
Attorneys for Defendants

By: 

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